Supreme Court, U.S.
FILED

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NO._____

In The
SUPREME COURT OF THE UNITED STATES

JOHN F.MALLOY(PRO SE) Petitioner

v.

TELEPHONICS CORP Respondent

On Petition for Writ of Certiorari
To The Court of APPEALS (FOR THE THIRD CIRCUIT)

PETITION FOR WRIT OF CERTIORARI

John F. Malloy
Pro Se
246 Gullane Road
Charleston SC 29414
(843)556-6391

QUESTIONS PRESENTED

1. **CHRONOLOGY (PPS_5) defines the fraud which the respondent used to obtain the award of a US Army contract DAAB-07-C-P001($12,492,318) followed by a series of additional false claims of a variety of violations, starting with the negoiations in September 1989 and ending in February 1996. "Where prime contractors have committed the fraud, each demand for payment has generally been construed as a claim in accordance with the statement of the Supreme Court of the United States" in United States v McNinch, 356 U.S. 595 (1958) at 599 . The FEDERAL DISTRICT COURT, NEWARK, AND 2THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT ONLY CONSIDERED THE FALSE CLAIM OF 9/27/91, ignoring the petitioner's arguments of continuous multiple false claims?**

2) **Title 31 sec3730(b)-states The action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reason for consenting. No such written consent from the Attorney General has been provided to the petitioner, even through this section was used as part of his defense in his Motion to Reconsider, which was rejected without comment. What is the effect of this violation of title 31? does it void the Court's decision?**

3.) **Knowing the variety and complexity of the False Claims, the he petitioner filed a motion requesting Oral Presentations in both courts to present the entire spectrum of the fraud ,in the logical and chronological sequence which is contained in THE STATEMENT OF THE CASE. The petitioner feels that the courts would have seen the variety of violations, the costs of which were higher than the false claim which was considered to be the only false claim by the lower courts?**

4.) Title 31 S 3730 (h) Pertinent portion:the employee "assistance in an action filed or to be filed under this section, shall be entitled to all the relief necessary to make the employee whole. Questions:

A. Does this relief provide protection against the Statute of Limitations?

B. Does this relief extend to equitable tolling? Since the application of tolling by the Courts was unequitable to begin with; recap 43 Month delay by the defendant with absolutely no explanation rendered or asked for by the Courts, despite the impact on the plaintiff. 4 months by DOJ which were not required, another sham the plaintiff had to absorb.; 5 months delay by the petitioner's brain surgery10 months by my ex-attorney's malfeasance.

3

QUESTIONS PRESENTED

1.) This complaint consists of three distinct section, but the lower courts treated them as one:

A. Retailtory Dismissal- 31 U.S.C. S 3730 (h) (see PG 3 of the Court of Appeals' opinion)" An action fileincluestigation for, initiation of, testimony for, or assistance in an an actionfiled or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.' This seems to exclude this section from Section 3731 Statute of limitations, and does relief apply to the unequitable application of equitable tolling, i.e. allowing the defendant to expend 43 months delay, out of 72 months allowed., and penalizing the petitioner for 33 days.

B. Motion to Recover Monies as Required by the Settlement Agreement -

This part of the complaint, was only included to demonstrate the extent of the frauds; it contains a Warranty Clause with a penalty, which the petitioner asks the court to impose.

C. The Complaint itself.

(2.)ON JUNE 30,1997 The Petitioner Filed a Title 31 Sec3729 Complaint against the Telephonics Corporation for its 9/27/91 False Claim filed against US Army Contract for 67 An/PPS-5 Radars, in the US Federal Court Charleston SC. The Petitioner had been the Program Manager for this Contract, had been opposed to this claim and was fired in retaliation for his position.

In Nov. 1998, at the request of my Attorney a Motion was filed to transfer the Complaint to US Court in NJ, And to replace my SC Attorney with a NJ Attorney, who was recommended by other Attorneys. The Complaint was transferred under Judicial Seal.

When Docket 98-1528(JWB) was opened the docket contained the name and address of Telephonics Attorney. despite the Seal. In early 1999, my Charleston Attorney achieved a Motion to Dismiss by the Court for failure to serve within 120 days. I immediately called my NJ Attorney to find out what was going; No problem he told me. The Petitioner told both the Court and his Attorney that he intended to attend the next hearing. The Petitioner and his wife drove 2000 miles round trip and four nights on the road, only to find that the hearing had been postponed and was provided with the new date in AUGUST. This time I only drove 800 miles because my wife called my cell phone, and told me the court had called and the hearing had been postponed. The next hearing of which I was not informed resulted in dismissal for failure to observe the 120 day rule, and I was uninformed, and my attorney did not attend.

In Nov 1999, The dismissal was discovered from a source unrelated to the court.

In Jan 2000 The Petitioner obtained the Docket Record, and discovered that The initial document opening the docket had included the defense aattorney's name, in violation of the judical seal, and that my attorney had never shown up for any hearing. My NJ Attorney was told to shape up or ship out, he was fired in Feb.1999. For two months I attempted to find a replacement with no takers. Acting Pro Se, A motion to reconsider was filed based on the DeFacto service of the complaint through the error in the opening of the docket by the Court, and the failure to provide the consent of the Attorney General. This Motion was rejected without comment. The Question, Even if in error, did the Court DeFacto served the Complaint by notifying the defendant and giving access to the file while it was still under Judicial Seal?

(3.) On Dec 24,1999, this Motion was denied, but the Order which dismissed the Complaint with prejudice was not received until early Jan.2000, and the Petitioner immediately went to work on the refiling of 98-1528(JWB). His NJ Attorney had neglected to file VOL II of the complaint which was basically a repetition of Vol I with supporting documents for the Complaint, and a listing of alleged criminal acts by Telephonics' employees. A third volume was prepared to define all the documents referred in the other volumes, so the jargon of the program was clear. The court required 5 copies of the complaint. The Petitioner prepared the five sets himself, reproduced them, collated them and bound each set with two rubber bands, and checked rechecked to ensure that each set was complete, and the most important check that each set had a copy of the complaint. The Petitioner took these sets to UPS for shipment, and addressed the envelope and the petitioner checked for the complaint in each set, and placed all 5 sets in the envelope along with **a check for** the complaint filing, and sealed the envelope. This package arrived at the court on

23 Feb.2001. The Title cover stating Refiling of Docket 98-1528(JWB) was filed on 2/23/01 as was the Motion to Recover the Settlement Agreement monies.The check was cashed, the docket was opened, supposedly without a complaint. The Court claimed that All 5 copies of the complaint and the letter of transmittal had never been received. In March 2001 the Petitioner sent five complete sets of all the documents in a 22 pound box, this box was accepted by the receptionist for the court; it also disappeared box and contents. In April 2001 on the third attempt, the Complaint was Filed, however, it was considered to be a new filing not related to the original.

So the complaint was dismissed with prejudice. While investigating the Feb.2001 shipment , the Petitioner discovered that the shipment weighed 9 pounds but the documents filed only weighed 6 pounds. 3 Pounds is the weight of the missing documents. If the date of filing of 2/23/01 had been used, instead of 4/2/01,this would have reduced the days late to 44 days.Since the Court had used Sept.21 1991 in their calculation, the 44days should be changed to 38days late.

(3) In the Statement of the Case,the Petitioner,clearly defines that There are there were dozens of false claims covering the entire contract. , but only the 9/27/91 false claim was considered for the calculation of the Statute of Limitation by noth lower Courts,which is a omission.**All** these other frauds shouldhave been considered?

In the Federal Court Newark's Opinion the Court accepted the validity of Equitable Tolling in this complaint**, and in United States of America ex rel Koch v Koch Industries inc 188 F.R.D. 617, 623(D. OK 1999).** The Federal Court Newark on(page 4) of their opinion states that Equitable Tolling is appropriate in three scenarios(pg5)

(1)Where the Defendant actively misleads a plaintiff with respect to his cause of action. In the Court of Claims

Case, roles are reversed. The plaintiff- Telephonics misleads the defendant DOJ by not revealing the contents of Rodale Lawsuit, and by concealing $1,000,000 in false changes. This amounts to a 36 month delay, which were not equitably Tolled, but were misleading DOJ and are definitely within the equitable tolling scenario.

(2) Where the Plaintiff has been prevented from asserting his claim as a result of other extraordinary circumstances. The Court Equitably Tolled the period during which my NJ Attorney as being neglectful. The word The Petitioner would have used was malfeasant; after the fee arbitration panel stated he was to return all fees paid. He refused, and the Petitioner took the case to The NJ Lawyers Fund for Client Protection, and after a fact-finding Telecon between a panel of Lawyers, the Petitioner, and his ex-Lawyer, at the end of which the panel gave my exlawyer 30 days to defend whatever amount he could. At the end of 30 days he could not defend a dime, and the NJ Lawyers fund reimbursed the Petitioner all his fees. During the period he was my Lawyer, he told me that everything was fine. Having Tolled the (10months) that he was my Lawyer, On OCTOBER 16,1996, the Petitioner was rushed to the hospital, and right into neurosurgery to repair a leaking blood vessel. After the operation, there was still a problem; the pressure of the blood on my brain had caused swelling, and it was 5 months before I was recovered enough to complete the Complaint draft. For some reason this five months did not constitute an extraordinary circumstance but should have been tolled. As described in the Statement of the Case, the false claim of 9/27/91 was rejected by the government on 5/5/92. Telephonics did not take any action until 12/10/92 (7 months.) This delay was not Tolled. The DOJ required 4 months to determine not to intervene. Why should this be tolled? Because DOJ had already decided

before this time begun to run. When DOJ arranged a meeting to discuss the complaint, the meeting, covering the contents of Vol I& II asted 20 minutes, with CECOM personnel present, there was no meaningful discussion, DOJ would not answer questions asked by the plaintiff. This meaningless farce should add 4 months to the elements to be considered for tolling, in total,there were 62 months which should have been considered for tolling ,of which 43 months were caused by Telephonics, and 4 caused by DOJ. In equity, the defendant should not have benefited from his 43 month delay; nor should the Petitioner be penalized. Anyone of these circumstances would have overturned the 33 days remaining beyond the Statute of Limitations, and.Based on the above, The petitioner states that the complaintshould not have been dismissed with prejudice, on Aug 23,2002.
(4.) In accordance with Title 31 sec130 The Court and the Attorney General must provide in writing their consent to the to the dismissal of the action, and their reasons for consenting. Since the Petitioner used the failure to provide him with the Attorney General's letter, as an argument in his Motion to Reconsider, no response has been received from the Court. To date, no Letter from the Attorney General has been provided to the Petitioner. Since there is apparently is no consent by the Attorney General in the dismissal of this action, shouldn't the complaint be reopened particularly since the Petitioner has been unable to address the reasons for the AG consenting if it exists? **What are the consequences** for failure to obtain this letter required by Title 31? Does this void the dismissal of 9/27/99?
(4) Motions were filed in both lower courts requesting an oral presentation similar to the STATEMENT OF THE CASE to ensure that the courts understood the magnitude of the fraud; this concern was correct; since only the 9/27/91 false claim was used to determine the date of the statute of limitations.

Attached is a 'Discharge Summary from the Nedical University of SC, covering the period 10/18/96 to 10/23/96, prepared by the attending physican Phanor L. Perot M.D., who was also my surgeon. While I was doing well physically, the Court's attention is drawn to postoperative day #3 release to the floor after 3 days in Neuro ICU, under restraints because of my uncontrolled behavior. After trandfer to the floor, the petitioner would get out of bed and wander the floor, once trying to leave the hospital; this I believe was the reason why I was released so early. If the Court will notice instruction 2 " THE PATIENTS ACTIVITY WILL BE TOLERATED; HOWEVER, THE PATIENT WILL REQUIRE SUPERVISION 24 HOURS A DAY. SINCE I WAS AT HOME THIS MEANT THAT MY WIFE AND DAUGHTER HAD TO ALTERNATE SLEEPING ONE UPSTAIRS AND ONE DOWNSTAIRS TO ENSURE THAT MY ACTIONS WERE CONTRLLED. AS AN OUTPATIENT, THE ADHESIVE TAPE BANDAGE ON MY HEAD WAS REMOVED, AS WELL AS THE EXTERNAL STAPLES; THE INTERNAL STAPLES IN MY SKULL STILL REMAIN. THE FOLOWUP VISITS 1 THRU 4, PLUS INSTRUCTIONS VISITS3. 4. TOOK THE REMAINDER OF THE 4 TO 5 MONTH INCAPACITATION. IN PARTICULAR STORM EYE CLINIC TESTING THE RECOVERY OF MY VISION. nOT MENTIONED, WERE SEVERAL VISITS WITH A STAFF PHYCOLOGIST RELATING TO MY DEPRESSION.BASED ON HIS RECOMMENDATION, i WAS PLACED ON AN ANTI-DEPRESSANT, WHICH I STILL TAKE, BECAUSE OF CONTINUAL SPATS OF DEPRESSION; COMBINED WITH PERIODIC MRI AND CT SCANS TO ENSURE EVERYTHING IS STILL ALRIGHT.

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The FEDERAL DISTRICT COURT, NEWARK, AND THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT ONLY CONSIDERED THE FALSE CLAIM OF 9/27/91, ignoring the petitioner's arguments of continuous multiple false claims?

2) Title 31 sec3730(b)-states The action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reason for consenting. No such written consent from the Attorney General has been provided to the petitioner, even through this section was used as part of his defense in his Motion to Reconsider, which was rejected without comment. What is the effect of this violation of title 31? does it void the Court's decision?

3.) Knowing the variety and complexity of the False Claims, the he petitioner filed a motion requesting Oral Presentations in both courts to present the entire spectrum of the fraud ,in the logical and chronological sequence which is contained in THE STATEMENT OF THE CASE. The petitioner feels that the courts would have seen the variety of violations, the costs of which were higher than the false claim which was considered to be the only false claim.

> **Title 31, sec 3730 (h) states: any employee who is discharged, demoted, suspended,threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section,including investigation for, initiation of, testimony for, or assistance in the action filed or to be filed inder this section shall be entitled to all the relief necessary to make the employee whole. Suchrelief shall include reinstatement with the same seniority status such employee would have had but for the discrimination,, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of discrimination, including litigation costsand reasonable attorney's fees. An employee may bring an action in the apprpriate district court of theUnited States for the relief provided by this subsection.**

Questions:

A. Does this relief provide protection against the Statute of Limitations?

B. Does this relief extend to equitable tolling? Since the application of tolling by the Courts was unequitable to begin with; recap 43 Month delay by the defendant with absolutely no explanation rendered or asked for by the Courts, despite the impact on the plaintiff. 4 months by DOJ which were not required, another sham the plaintiff had to absorb.; 5 months delay by the petitioner's brain surgery10 months by my ex- attorney's malfeasance.

QUESTIONS PRESENTED (Part 2)

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Attached is a 'Discharge Summary from the Nedical University of SC, covering the period 10/18/96 to 10/23/96, prepared by the attending physican Phanor L. Perot M.D., who was also my surgeon. While I was doing well physically, the Court's attention is drawn to postoperative day #3 release to the floor after 3 days in Neuro ICU, under restraints because of my uncontrolled behavior. After transfer to the floor, the petitioner would get out of bed and wander the floor, once trying to

leave the hospital; this I believe was the reason why I was released so early. If the Court will notice instruction 2 "
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Both Dr. Perot and Dr. Du Bois have retired, and presently unavailable. Since my day-to-day activities had been monitored by my family, I'm sure that they will file an affadavid to support my position.

Discharge Summary

Patient: MALLOY, JOHN **MRN: 000826312**

Service:
Admitted: 10/18/1996 00:00

Attending: Phanor L. Perot Jr., M.D.
Discharged: 10/23/1996 00:00

Referring:
Status: INITIAL

REASON FOR HOSPITALIZATION

The patient is a 63-year-old white male with a one-day history of headache. The patient had seen family practitioner yesterday and treated for sinusitis. The headache persisted and the patient was told to go to the emergency room at Charleston Memorial Hospital. The patient evaluated at Charleston Memorial Hospital and then sent immediately over to MUSC for a CT scan which showed right temporal lobe intracerebral hemorrhage.

SIGNIFICANT FINDINGS: On physical exam the patient was somewhat somnolent. The patient arouses easily and is appropriate and oriented x 3. The patient has poor effort with exam but appears to have 5/5 motor strength in all extremities except for a mild drift in his left arm. The remainder of the physical exam is within normal limits. CT performed shows a moderately large right intratemporal hematoma. Arteriogram performed shows no aneurysm or AVM.

PROCEDURES PERFORMED AND TREATMENT RENDERED: The patient was admitted to the neurosurgery service and had an arteriogram with results as above. The patient was then taken to the operating room where a right temporal craniotomy and evacuation of right intratemporal hematoma was performed. Postoperatively the patient did well and was taken to the neurosurgery intensive care unit where he was extubated that evening. The patient's recovery continued well, and on postoperative day #3 the patient was transferred to the floor. Follow-up CT scans of the brain showed some mild edema and the patient was started on steroids. The patient's recovery on the floor was unremarkable, and over the next couple of days the patient regained strength in his left upper and lower extremities. The patient was discharged to home on postoperative day #5.

CONDITION ON DISCHARGE: The patient will be discharged home in stable condition. The patient has some residual weakness on his left side which is improving; however, the patient has approximately 3-4/5 strength in his upper extremity and lower extremity on the left side. The patient has some severe visual field deficits mainly on the left side. The patient also seems to have some severe left-sided neglect.

SPECIFIC INSTRUCTIONS GIVEN TO THE PATIENT:

1. The patient will be discharged home with the instructions to resume his normal regular diet.

2. The patient's activity will be as tolerated: however, the patient will require supervision 24 hours a day.

3. The patient will be scheduled for outpatient physical therapy.

4. Home health will be set up to assist patient at home.

5. The patient has been instructed to keep wound clean and dry and to change dressing every other day until staples are removed.

FOLLOW-UP:

1. The patient will return to 7-East nursing unit for removal of staples on 10/25/96.

2. The patient will be seen in Dr. Perot's clinic in approximately 3 weeks.

3. The patient also will be seen in Dr. Dubois' clinic at the next available appointment.

4. The patient will also follow up in the Storm Eye Institute as an outpatient.

1.) The lower Courts Failure to consider the total fraud presented in the STATEMENT OF THE CASE, AND IN THE CASE LAW CITED, ONLY RECOGNIZING THE 9/27/91 FALSE CLAIM AS THE ONLY FALSE CLAIM SUBMITTED AGAINST THIS ARMY CONTRACT WAS INCORRECT.

2.) THE LOWER COURTS APPLIED EQUITABLE TOLLING IN AN APPROACH WHICH REWARDED TELEPHONICS FOR THEIR 43 MONTHS OF DELAY AND PENALIZED THE PETITIONER, FOR 33DAYS LATE. Now, there is support for the tolling of my brain surgery and recovery which should then be tolled for 5 months, erasing the basis of the lower courts decisions on the statute of limitations.

3.) WHEN DOCKET 98-1528 WAS OPENED IN FEDERAL COURT NEWARK, THE DOCUMENT CONTAINED THE NAME, ADDRESS AND PHONE NUMBER OF TELEPHONICS ATTORNEY. WHEN THIS WAS USED BY THE PETITIONER IN HIS MOTION TO RECONSIDER THE 9/27/99 DISMISSAL WHERE HE CLAIMED THAT SERVICE OF THE COMPLAINT HAD DE FACTO BEEN ACCOMPLISHED BY THIS ERROR, AND DISMISSAL FOR VIOLATING THE 120 day RULE SHOULD BE VACATED.

4.) TITLE 31 SEC 3730 REQUIRES THE CONSENT OF THE ATTORNEY GENERAL BEFORE THE ACTION CAN BE DISMISSED. THE PETITIONER HAS NEVER BEEN PROVIDED THIS DOCUMENT, EVEN AFTER THE LACK OF THIS DOCUMENT WAS USED IN THE MOTION TO RECONSIDER, AND IF IT EXISTS THEN THE PETITIONER DID NOT HAVE AN OPPORTUNITY TO RESPOND TO THE ATTORNEY GENERAL'S REASONS FOR CONSENTING, WHICH IF IT EXISTS MAY HAVE INFLUENCED THE FEDERAL COURT NEWARK'S OPINION.

6.) THE DELAYS THE PETITIONER ENCOUNTERED ON HIS FOIA REQUESTS. HIS REQUEST FOR THE THE CONTRACT RESULTED IN AN INCOMPLETE SET; THE LAST MODIFICATION WAS MISSING, AND A SEPARATE FOIA HAD TO BE SUBMITTED FOR IT. WHEN THE CHARGE FOR THIS MODIFICATION WAS TWICE THE COST OF THE ENTIRE CONTRACT, HE CHALLENGED. THE RESPONSE WAS THAT THIS MODIFICATION HAD NOT BEEN FILED WITH THE REST OF THE CONTRACT, AND IT TOOK TIME(2DAYS) TO FIND IT, AND ALSO

REQUIRED" SOMEBODY'S" AUTHORIZATION TO RELEASE. HIS MODIFICATION CONTAINED THE DOJ SETTLEMENT AGREEMENT, WHICH IS EXACTLY WHAT HE SUSPECTED. WHEN HE COMPARED THE CLAUSES OF THIS AGREEMENT WITH THE RODALE LAWSUIT,THE EXTENT OF FRAUD BECAME APPARENT. WHEN A FOIA WAS ISSUED TO OBTAIN ACCESS TO THE CONTRACTING OFFICER'S FILES. THE WORD CAME BACK TO THE PETITIONER THROUGH A BACKCHANNEL THAT "THE SOMEBODY" HAD STATED "UNDER NO CIRCUMSTANCES WAS I TO BE ALLOWED TO SEE THOSE FILES". AFTER REQUESTING ASSISTENCE FROM MY CONGRESSMAN, I FINALLY RECEIVED A LETTER FROM A COLONEL IN THE CONGRESSIONAL LIAISON OFFICE, AND AFTER SEVERAL ROUNDS OF LETTERS AND CALLS, THE PETITIONER FINALLY HAD ACCESS TO THE FILES IN JULY 2000. THESE FILES WERE SCHEDULED TO BE DESTROYED IN TWO WEEKS; I ALWAYS THOUGHT THAT THE TIME OF DESTRUCTION WAS 5 OR 7 YEARS AFTER THE CLOSING OF THE CONTRACT(2/96) IN THIS CASE ONE OR THREE YEARS EARLIER THAN THEY SHOULD HAVE BEEN DESTROYED.

7.) THE PETITIONER HAD DELAYED THE FILING OF HIS COMPLAINT UNTIL DOJ'S SETTLEMENT OF THE COURT OF CLAIMS CASE ON 12/18/95.

CONCLUSION The petition for a writ of certiorari should be granted.

Respectfully Submitted,

_____

John F. Malloy
COMMANDER USN(RET),BS,MS,MBA+

Date:_____

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LIST OF PARTIES

Attorneys for the defendant, Telephonics
Dunetz, Marcus,L.L.C.
laza II, Suite 1500
Livingston, NJ. 07039-1023
(973) 740-1200

United States Court of Appeals
for the Third Circuit
400 U.S. COURTHOUSE
401 MARKET ST.
PHILADELPHIA,
PA 19106-1790

U.S. DISTRICT COURT
DISTRICT OF NJ.
M.L.KING JR FEDERAL OFFICE
BUILDING & FEDERAL COURTHOUSE

SOLICITOR-GENERAL OF THE
UNITED STATES
ROOM 5614
950 PENNSLYVANIA AVE. N.W
WASHINGTON, DC 20530-0001

List of Authorities

FEDERAL PROCUREMENT LAW

Cases Pages 613,614

RALPH C.NASH, JR

JOHN CIBINIC, JR

George Washington University

WESTLAW

FINDLAW

STATUTES AND RULES

10USC

18USC

31USC

OTHER

CITADEL (Military College SC)LEXUS/NEXUS

JURISDICTION

DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE JUNE 20, 2003.
tHE INITIAL FILING TOOK PLACE ON SEPT.23,2003, WHICH WAS RETURNED DUE TO ERRORS, WITH A 60 DAY GRACE PERIOD.

STATEMENT OF THE CASE

The case is divided into three distinct sub- complaints.:

1.) The False Claim of 9/27/91; that date is important because both the Courts and the defendant used the incorrect date of 9/21/91. The entire Petition is based on the defendant that this fraud depended on the assumption by the Courts that it is only one false claim 9/27/91, while the petitioner argued that is was a series of false claims commencing in 9/89 and ending in 2/96. The observations of the petitioner from 9/89 to 7/91, combined with a mass of documentary evidence formed his argument: the statement follows below

2.) The Motion to recover monies paid in the settlement agreement. In this separate action the petitioner presented evidence that the defendant had violated the Warranty clause of the Settlement Agreement, and another set of documents illustrating the continuous series of false claims; all the courts were asked to do was enforce the Warranty Clause. There is no Statute of Limitations in the Settlement, so it should not have been dismissed at all, only enforced.

3.) Retailitory Dissmissal, under 31 U.S.C. S3730 (See Questions).

DETAILED CHRONOLOGY OF THE CONTINUOUS FALSE CLAIMS

The Petitioner will illustrate the length and variety of FALSE CLAIMS which extend from prior to the award of Contract DAAB07-C-P001(PPS-5B)($12,492,318)-OCT 31 1989 and continued unabated to the end of the Contract-Feb 1996, and by so doing illustrate that there is no single date that defines the false claims. The Petitioner filed a Motion requesting an oral presentation to explain the complexity of these FALSE CLAIMS, in both lower courts, but in each case, the Motion was rejected.

At this point, thePetitionerincludes the following case law for consideration:

Brown v. United States 207 Ci. Cl.768, 524 F.2d 693 (1973) : The Court of Claims ruled that the Government could refuse payment on a fully performed contracts which were obtained inviolation of the False Claims Act, 31 U.S.C., and the False Statement Act 18 U.S.C.,previously 28 U.S.C., which prohibits the payment of claims to persons found to have corruptly practiced or attempted to practice, any fraud against the United States.

Little v. United States, 138 Ct. Cl. 773, 152 F. Supp. 84(1957) The Court interpreted this statute as prohibiting partial settlements of contracts wherein fraud was committed on the basis that the fraud destroys the validity of the entire contract.

United States v.McNinch, 356 U.S. 595 (1958) at 599 Where prime contractors have committed the fraud, each demand for payment has generally been construed as a claim in accordance with the statement of the Supreme Court.

1989- Portugal requests a proposal for 72 PPS-5 systems from US Army and specifies that the procurement is limited to the PRIOR PRODUCER, i.e.AIL Systems; In Foreign Military Sales, the customer may specify who is to be awarded the Contract.

1989- AIL Systems plans to sell the Command Systems Division (which was the profit center for the PPS-5B) to TELEPHONICS.

1989- If Telephonics were to be awarded the PPS-5 Contract they must use the sources of AIL the PRIOR PRODUCER , i.e USE THE SAME MANPOWER, MACHINERY, AND MATERIAL. The Petitioner, prior to transferring to Telephonics had been AIL's Product Support Manager and Deputy Program Manager responsible for the manufacture and delivery of the previous 900 PPS-5B Systems.

1989- Request for quotation from CECOM for 72 Systems was received. The Petitioner, as the Bid Manager, prepared the proposal using AIL's vendors and subcontractors previously providing satisfactory delivery and quality for the assembly and test of the equipment.This was an achievable approach. If Telephonics had implemented this plan,**it would have satisfied the PRIOR PRODUCER REQUIREMENT FOR AWARD.** The Request for Quotation included a clause where anticipated sole source awards to subcontractors were to be listed; the Petitioner listed all the long lead time subcontractor items to protect the proposed delivery of the equipment.With the suppliers known, the quotes could be updated for the proper quantity and negotated before the award of the prime contract, and award of tsub-contracts could occur immediately after award of the prime contract, saving the front end of the subcontract by several months.

1989June-July,The proposal was approved by Telephonics management, submitted toCECOM for technical evaluation, and to DCAA for audit.

1989 August- The Petitioner, accompanied by a contract administrator negotiated the price for 72 systems with CECOM. However, the price was too high for Portugal. and CECOM requested a rebid of total price by the quantity between 60 and 72 systems.

1989 Sept- -the requested proposal was prepared and submitted to CECOM by the quantities by the Petitioner based on the negotiated price for 72 systems, and this proposal was approved by Telephonics Management.

1989 Sept - The Program Plan defining the procurement, assembly and test events that supported the negotiated price of 72 systems was released by the Petitioner,as required by TELEPHONICS INTERNAL PROCEDURES.

1989 SEPT- In response to the Program Plan,the VP of Material issued a memo indicating that he was going to compete the sole source items mentioned above, thereby compromising the the negotiated price of 72 systems which was based on the sole source subcontractors,as was the system delivery.

1989 Sept- Joseph Smith, VP of Command Systems Division, elects to negotiate the final price and quantity alone. **HE SIGNEDTHE PROPOSAL BASED ON THE NEGOTIATED PRICE OF 72 SYSTEMS, HE WAS AWARE OF THE PROGRAM PLAN WHICH DEFINED THE BASE FOR THE NEGOIATED 72 SYSTEMS, HE WAS AWARE OF THE VP MATERIAL'S MEMO.** Smith decides not include the Petitioner in the negotiating team. ThePetitioner was the only person in Telephonics knowledgeable of the contract's requirements and the details of the pricing of the cost proposal. Why was the Petitioner left behind? Perhaps there was a concern about him disclosing the the VP Material's Memo, which could have setback the award several months for a rebiding cycle. At this negotiation,the first question from theCECOM Contracting Officer was (Where is Malloy"?(Malloy had been on the PPS-5 program for 25 years and had negotiated all the previous PPS-5 contracts and had an excellent reputation within CECOM, for truth and openness, and for going out of his way to support CECOM.The first offer made by the Contracting Officer

was a contract for 67 systems for the total price of 62. Smith accepted the offer, without a counter-offer, for an immediate loss of $780,000.WHY? ApparentlyTelephonics had already taken credit for the award, and was using the award as the internal justification for buying the Command Systems Division, and the negotiations had to be completed before the Stockholders Meeting at the end of ptember,1989.

However,in his haste Smith, by concealing these facts, and pretending to endorse Malloy's proposal,(the entire pricing had been based on the negotiated price of 72 systems) had violated the False Claims Act 31USC3129 (Smith knew that his approach would not satisfy the Prior Producer requirement), theFalse Statement Act 18 USC 1001 (by decieving the Contracting Officer into believing that the contract would be operated on the same basis as the negotiated quantity of 72 systems), and the Truth in Negotiations Act (Smith did not disclose the competition of the sole source items).Title 31 False Claims Act(because Smith concealed the fact that Telephonics would not even pretend that they were the prior producer, and therefore did not meet the requirement or award) The Court of Claims ruled in Brown v US 107CL 768,524 F.2D 693(1975)that the Government could refuse payment on a fully performed contract which was obtained in violation of these statutes.In **Little v United States** 138 Ct. Cl. 773 F. Supp 84(1957) The Court interpreted these statutes as prohibiting partial settlements of contracts wherein fraud has been committed to obtain the award, on the basis that the fraud destroys the validity of the entire contract.

Where prime contractors have committed the fraud, each demand for payment generally been construed as a claim in accordance with the statement of the Supreme Court in **United States v Mcninch 356 U.S. 595(1958) at 599.** This case law strnghtens the petitioner's argument of continuous fraud.

1989 Oct 31- Contract awarded, without the PCO having knowledge of Smith's fraud..

1989 Nov 1- Telephonics requests authorization for payment of pre-contract costs of $266,000. The request was rejected and the precontract costs disallowed by the Procuring Contracting Officer at CECOM.

1989 Nov - Telephonics Finance issues the Project Release Authorization which clearly indicates that the contract has a special billing clause C-18 "Limitation of Progress Payments"($4,800,000 limit until the Qualification tests -GroupC- envonmental, and D-Reliability were successfully completed; they never were)

1989 Nov 30 Telephonics submits a Progress Payment Request (80%) which includes the disallowed $266,000.(in violation of Cost Accounting Standard 405-
Accounting for disallowed costs). When the Petitioner informed Telephonics Contracts Manager (R.Gerstner) his reply was " SO WHAT! Does an intentionally false Progress Payment Claim destroy the validity of all future Progress Payments?

1990 Jan 30- Procurement meeting with Telephonics Management on how the Material, and Assembly,were to procured.Telephonics Management decided to go their own way on all procurements,including the approach to mechanical and electrical assemnbly.**Quotations supporting this approach had already been obtained from their selected subcontractors. At this point the Program Plan had been thrown out, as was the basis of the Proposal, and the equipment delivery and requirements for award i.e.PRIOR PRODUCER. The position taken by Telephonics Management at this meeting is confirmation that Telephonics never meant to implement the**

Proposal. As previously discussed, these actions taken immediately after contract negoiations. , these prearranged actions provide proof that the contract was obtained by fraud. Obtaining Quotations takes several months, and to have them on hand 3 months after contract award indicates that this change in approach had been planned for some time.

1990 Feb- The Petitioner issued a memo implementing the results of the meeting changes resulted in additional bid cycles which delayed award of major subcontracts by two to three months. The contract was now **7MONTHS LATE** .

1990 May-the engineering change notices began to pour fourth from the subcontractors, vendors and Telephonics' Product Support group, the intent of which was clear.That the only purpose was to run up the number of changes, or later use in a claim.These changes continued up to ECP 099 at which time the false claim of 9/27/91 was presented. Telephonics tried to claim that ECP099 was issued after 9/27/91 and subsequently submitted two false claims totaling $370,000. (Brief History of ECP099: Telephonics: issues a Value ECP to replace the Transistor JAN2N910 with transistor JAN2N2484; DUE TO HIGH GAIN of the JAN2N910.

ECP 101 was issued before the 9/23/91 to replace the JAN2N2484with Transistor JAN 2N3700 due to the high gain of the JAN2N2484(this requires the replacement of 24,000 transistors for assemblies at the subcontractor at no cost to the government) ;ECP099 is falsely issued 9/30/91 (after the issuance of theFalse Claim of9/27/91and after knowledge of the gain problem); reason to add a potentiometer to control the high gain of the JAN2N2484 (this was an existing change, which would have been detected had the drawing review been conducted properly).

But ECP 101 demonstrated that Telephonics knew about the problem before the 9/27/91 False Claim in which they concealed ECP099 to use it for a delay claim, which they did in the amount of $330,000: as will be demonstrated later, after the termination of subcontractor Lucas Aul in (August 19991 this will be discussed lin details later) the assembly involved,(which used the JAN2N2484) was ten months late, and any delay claim would be false, so the $330,000 delay was another FALSE CLAIM. ECP099 rework and delay were also in the cost proposal of the FALSE CLAIM of 9/27/91, and the false claim for$370,000 was duplicated in the 9/27/91 FALSE CLAIM.

1990 Dec-- J.Battaglia VP Radar requested the Petitioner to review all of the changes to date to determine whether or not these changes could support a claim.

1991 Jan-Petitioner confirmed that the Class II changes (no impact individually nor in total) would not support any increases.. The Petitioner also informed Battaglia that only the five Class I changes (impact on price and delivery) offered any increase.At this meeting, Battaglia stated that he had promised Griffon Management a $1,000,000 claim based on these changes, with no kowledge of what these ecp's were..

1991 Jan- Battaglia then ordered a panel review of the changes. the panel to consist of the Petitioner, Program Manager, and Barone, Product Support Manager. The detailed report agreed with the Petitioner's original report; The panel's report listed each ECP, the assembly affected, and whether or not the ECP had any impact on cost or schedule.The information which related to no cost or no schedule impact was deleted in the 9/27/91 FALSE CLAIM. The Petitioner sat down with Battaglia and reviewed the report in detail, so there would be no misunderstanding of the facts in this report. The

results of this panel study were confirmed by Barone in his interview with Criminal Investigation Division CECOM.

1991 Jan 31- **Contract is in default**.Per contract clause C-12 Progress Default.

1991 Jan to AUG- action on five COST ECPs were completed prior to the 9/27/91FALSECLAIM, which means the actual costs of all these changes were part of the incurred costs of 9/27/91 claim, and by submitting false Class 1 ECPs (affects cost and schedule) for separate payment,Telephonics was trying to collect **twice** on these costs. These False Claims ere approved into the contract on12/20/91, at a cost not to exceed of $126,744, PLUS the Delay False Claim on ECP099, the assembly which this change affected was ten months late at the time. Any costs associated with this delay was another false claim.

1991 Feb 28- Telephonics fails to deliver the Group C and D systems which is a Major Contractual Critical Event. **THIS IS THE SECOND DEFAULT.**

1991 March- Even with two defaults, Telephonics continued to submit FALSE PROGRESS PAYMENT CLAIMS.

1991 May- Telephonics admits to CECOM that it has a $1,000,000 overrun, but does not adjust Progress Payment Claims for the Overrun(Violation of DOD regulations),and continues to submit false Progress Payments claims for this overrun, which of course is part of the false claim of 9/27/91, and againTelephonics is collecting money on the False Claims prior to any ettlement.

1991Feb- Telephonics terminates an FFP subcontract for convenience, subcontractor Rodale who was building the two system wiring harnesses. Telephonics had provided a faulty data package, which Telephonics knew to be faulty before the award of this subcontract. The Petitioner discovered this deliberate action in Jan 1991when he visited Rodale and immediately issued a "STOP WORK" order, and instructed Barone(Product Support Manager) to provide the correct documents. But because Telephonics needed the work, Telephonics terminated Rodale for convenience. This action should be construed to be a deliberate attempt to delay a Government Contract, 15 months had been lost. in Rodale's Civil suit of (8/23/95), one of Telephonics Counterclaims,claimed that this termination action on the two harnesses resulted in Telephonics incurring a $300,000 overrun; these harness assemblies were being assembled at Telephonics in March,1991(using the correct data package). This means that the $300,000 was in the incurred cost proposal part of the FALSE CLAIM of 9/27/91. This is a clear example of Telephonics trying to pass the cost of their deliberate errors onto the government.Telephonics also claimed a $190,000 for two field Inspectors placed in Rodale for in-line assembly inspection. The Petitioner observed these inspectors during his Jan.1991 visit. Telephonics is attempting to recover direct costs. The costs were were being charged to the CECOM contract. However, these inspectors were actually Two Receiving Inspectors normally charged to Materiel Handling Overhead;This Would be a violation of Cost Accounting Standard 401-Consistency in Estimating,Accumulating, and Reporting Costs: this cost should have been made to an overhead account, not to a direct cost charge, which might explain the underrun in that Overhead account.When the Petitioner visited Rodale in Jan. 1991

the two inspectors were in residence at Rodale;in an attempt to conceal these costs, Telephonics tried, in their counterclaim in the Rodale Lawsuit, states to say that these two inspectors were placed in Rodale in 1992; for the small number of assemblies remaining to be completed,and the small amount of labor involved, these inspectors could have completed the remaining assemblies at Rodale themseves.

.1991 June 30-The Petitioner- Malloy noticed the Progress Payment Request for June was too high; so he verified by examining clause C-18 and confirmed that it was $4,000,000 above the Cap specified in Contract Clause C-18 Limitation of Progress Payments,which limits Progress Payments to $480,000 until the Qualification Tests are passed.When this overbilling of $4,000,000 was brought to the attention of Contracts Manager, (R. Gerstner),his response was-"as long as they Keep paying, we'll keep billing" . This Progress Payment Claim should never been submitted since the contract was in default and in violation of Contract. There is still the question whether any of the Progress Payments Claims were valid after the impact of the FIRST FALSE PROGRESS PAYMENT 1989 Nov 30Previous;even if this false progress payment has no impact. Since clause C-18 requires successful completion of Group C and D, whichTelephonics never achieved approval for either test. This means that under Clause C-18 Telephonics could only submit Progress Payment Claims up to the amount of $4,800,000. Any claim beyond was a FALSE CLAIM, and his means, that Telephonics knowingly submitted dozens of FALSE CLAIMS collecting millions of dollars to which were not contractually entitled .

1991July- Battaglia calls a meeting to discuss the claim ; attending were Product Support(2) Contracts (2-,including the Manager), Quality Assurance (1) ENG (3), Program -The Petitioner Malloy (Prior to this meeting, the Petitioner Malloy had taken a two week vacation; when he returned, he found that Battaglia had hired his replacement in an attempt to pressure the Petitioner-Malloy into supporting the claim). Malloy was invited to this meeting in an attempt to get him to use his reputation with CECOM to obtain payment of the False Claim. At this meeting Battaglia VP Radar and Barone presented the basis of the claim-defective drawings(both were well aware of the Jan 1991 study-which determined that these ECPS to that date did not support a claim),DEFECTIVE GFE , and Mandatory Inspection. Malloy explained with facts why each of these claims would also not support a claim. When the meeting ended and Battaglia knew that he would not get thePetitioner's support.The next day the Petitioner Malloy was fired in retaliation for his position on the claim. This action created the second part of the Complaint-RETAILITORY DISMISSAL. But the Contracts Manager(R.Gerstner) who attended the above meeting was the same individual who signed the FALSE CLAIM letter of 9/27/91, with total disregard for the truth.Further, he also falsely stated in that letter that the government was responsible for the entire overrun, when the cause was all Telephonics decisions.

1991 AUG- Telephonics terminates Lucas Aul subcontractor for 3685 Range Gated FilterAssemblies to settle a dispute over Telephonics' failure to provide the assembly tools required by the work statement in the subcontract. (two sets of these tools had been personally inventoried by the petitioner at Telephonics prior to contract award,and Telephonics never reported in any government inventory that these tools were missing.(An informant told Malloy that the tools were made to disappear); this constituted a

second deliberate attempt to delay a government contract and pass the costs onto the government.The settlement agreement with Lucas Aul indicated that the termination was due to breach of the subcontract by Telephonics. As a result Telephonics had to pay full cost of the subcontract and accept the inventory (which was only half complete, and Telephonics had to complete the 3685 assemblies-at an estimated cost $250,000 (This cost is valid since Malloy had been the chief estimator of the PPS-5 for 25 years). Since this agreement was reached prior to the 9/27/91 false claim, these costs must have been included in the costs to complete. At the termination, thehese assemblies were EIGHT MONTHS LATE, and MOVING OF THE MATERIAL, AND SETTING UP THE FACILITIES FOR COMPLETION WOULD TAKE A MINIMUM OF TWO MORE MONTHS. A TOTAL TEN MONTHS LATE, since the cost of the FALSE ECP099 DELAY CLAIM was.$330,000,plus the the the change portion for Material and rework of Jan.1992($30,000 false claim plus the costs caused by the termination of $250,000 costs included in the 9/27/91 FALSE CLAIM, Together add up to $610,000 in FALSE CLAIMS.

THIS WAS NOT DISCLOSED TO DOJ

1991 Sept on orafter 27-Telephonics submits a false claim of $ 1,618,000 (Two months after the submission of the false claim of 9/27/91, the Business Manager was fired for having missed another $500,000 overrun), making the real overrun $2,118,000) to the CECOM Contracting Officer based on:

- **DEFECTIVE DRAWINGS**
- (NOTE: Telephonics signed an acceptance of these drawings, as required by the contract.)
- Defective drawings provided by CECOM (please note the entry for1991JAN-The detailed analysis of the changes determined that the changes through 12/30/90 would not support a cost claim).The no impact on Price and Delivery columns of the detailed study were of course deleted, making the ECP list submitted with this claim a FALSE STATEMENT.
- Telephonics proposal was based on 300 engineering changes and the costs associated with 300 changes should were in the bid; the False Claim claims damages for only 174 changes, and(25% of which were required contractual changes or duplicates of other changes).The remainder were not required.
- The majority of the changes were incorporated into the contract with no change in price,schedule or other conditions, based on examination of the contract modifications. Telephonics accepted the changes at no change in price, delivery or other conditions. After deceiving the CECOM Contracting Officer into approving(another False Statement) , and
- accepting these changes on the basis of no change in price or delivery.Telephonics not only submitted a FALSE CLAIM,but a FALSE CLAIM by failing to disclose that these changes had previously been accepted on a no cost, no delay basis.
- Later, Telephonics denied there were defective drawings in the Rodale civil action.Rodale had received over 100 drawings from Telephonics.elephonics claimed that the Configuration Management clause prevented them from proceeding on these changes without CECOM approval. However, this clause also required CECOM

approval for repairs to any parts, but Telephonics repaired 337 parts(137 violations more than the number of changes) without CECOM"S approval, and repaired them in violation of the theQualityAssurance Specifications of the contract and the basic Quality Assurance Specification MIL-Q-9858. Telephonics was being passed off as a 9858 manufacturer. The parts were removed by Telephonics Quality Assurance personnel from the Painting subcontractor to the Fabrication subcontractor and after repair were returned to the painting subcontractor without any paper trail to record the repairs, or movement,without the resident government inspector's permission or knowledge. Compliance with the contract only applied,when Telephonics thought it could be used to support their false claims.

- Final fraud under the Configuration Management Clause occurred whenTelephonics failed to incorporate all these changes into the CECOM originals as required by this clause.
- **DEFECTIVE GFE** Telephonics in their review of Government Furnished Equipment prior to the Proposal had estimated 1000 hours in the proposal for repair of the test equipment and Telephonics agreed to absorb another 1000 hours for calibration procedures for the test equipment. The calibration procedures, with the exception of 2 or 3 complex test sets had never been required by CECOM or DCASQAR.
- After spending 2000 hours on 100 test sets(200 hrs/per), it is inconcievible that this equipment caused any overrun,or cause delays.
- Add to this these test sets were in use at AIL up to the late 1980's, and under the conditions of the Sale of Command Stsrems, AIL would have recalibrate these test sets for Telephonics if they asked, which they didn't.
- The other missing items were discovered in Telepphonics possession, except for the External Power supply Gages which the Petitioner and Telephonics Contract Administrator knew were in the possession of Modular Devices, Long Island for which the petitioner had arranged a loan between the prime contractors.
- **MANDATORY INSPECTION COSTS**

(government inspection at the sub-assembly level),which is allowed under the contract and MIL-Q-9858.

The Petitioner Malloy factored in these costs as part of the proposal, based on the historical costs of mandatory Inspection costs previously encountered at AIL.

Telephonics in submitting the false Claim of 9/27/91, acted in reckless disregard of the truth or falsity of information.(31USCsec3729(C)(3).(violated the FALSE CLAIMS ACT). By 9/27/91, Telephonics through their own actions had overrun the contract well in excess of $2,000,000.In addition,Telephonics violated the TRUTH IN NEGOTIATIONS ACT by failing to disclose the costs of five Class I ECPS, the disallowed costs and recovery of the termination costs,which were included in the FALSE CLAIM.

1992 Feb-Malloy takes a temporary position with CECOM to evaluate MILSTAR Proposals. Telephonics discovered that Malloy was now a CECOM employee, and their reaction is to offer a Settlement of $699,000,which was rejected.

1992 May 5- The CECOM Contracting Officer REJECTS the false Claim of 9/27/91.

1992Aug 11- TELEPHONICS FAILS THE GROUP C RAIN TEST but generates a false Class I ECP119 to Redesign a switch on theBezel Assy of the Control Indicator,which Telephonics claimed had leaked in GroupC Rain Test, but in reality the leak had been caused by poor workmanship in the application of the required silastic(silicon grease). Silastic has been used for 20 years and numerous RainTests without failure.

If the silastic was so reliable, how did Telephonics sell this ECP. Telephonics deceived CECOM by running an invalid test which garanteed failure.. Silastic is used to seal all the gaskets,and all protruding shafts. all of these points passed the RainTest, which proves that silastic seals are effective when properly applied; this false claim for Class I ECP119 was submitted at a cost $456,859.

THIS ECP WAS NOT DISCLOSED TO DOJ

1992 Dec 10-Telephonics files an appeal of CECOM's rejection of the false claim to the Court of Claims(Docket 92-846 C0.) The FALSE CLAIM of 12/10/92 Has been presented a second timeand is again an active false claim. Since there are two dates of filing which is the date to use for the calculation of the Statute of Limitations, particularly since Telephonics abandoned the 9//27/91 when they offered to settle in March 1992.The Petitioner's complaint, filed on June 30,1997 would have passed the criteria Federal Court Newark's calculation that the Petitioner's complaint was 82 days late and the Petitioner's Docket 01-0944(JWB) would not have been dismissed with prejudice.or this decision upheld in the Court Of Appeals(3rd Circ)(Docket 01-1936).If a different date of presentation was used.

1993 July 7- Seven ECP false claims relating to earlier are finalized, increasing the unit price of the systems.This action delayed the presentation for payment to 8/21/95 when delivery of the systems completed. Shipment was allowed under GroupC waiver.

1993 August 13-- Progress Payment rate increased from 80% to 85%, which results in another false Progress claim of $700,000. since the requirement of Clause 18 Limitation of progress payments has not been met,and the $480,000 limit is still in effect.

1994 Nov 11- Prior to this date, CECOM and Telephonics signed an agreement to waive the 60mhz susepability test of the Elecromagnetic Interference. Telephonics had failed to provide the necessary conformal coating tools to Rodale,which resulted in conformal coating (an insulator) to adhere to the surfaces providing the Electromagnetic seal and had failed to notice that the IF and AFC chassis did not have a light iridite finish(non-insulating) as required by the drawings. These errors combined, destroyed the Electro-Magnetic seal of the IF and AFC amplifiers resulting in this failure. 60mhz is a critical frequency which was used in several types of field radios. If these radios were operated in the vicinity of the PPS-5, they would interfere with the PPS-5's performance.

Telephonics refused to give their subcontractors the AIL assembly instructions and the necessary tooling to assemble the items which would have yielded a product similiar to AIL's, and which the Petitioner- Malloy had also used successfully a number of times(over 30,000 assemblies). This is another example of Telephonics avoiding any semblance of being the prior producer. Since these instructions contain all the instructions for assembly and the order in which they should be performed, and the tools required for assembly. They also contained , all the '"lessons learned" and all of the specifications requirements, both government and commercial for over the 25 years of manufacture.

Telephonics may have been looking for more Class I changes, as the subcontractor's relearn. That approach ended when CECOM received a Class I ECP from Telephonics for the power transistor in the Motor Control Assembly which was shorting out. CECOM contacted the Petitioner-Malloy who informed CECOM that the AIL assembly instructions provided to Telephonics specifically told them how to avoid this problem.Since Telephonics Manufacturing Engineering had reviewed AIL"s Assembly instructions, they were aware of this problem, and should have advised the subcontractor or Telephonics Inspection to avoid the problem; further Telephonics had been provided a complete system for comparison to the new systems to eliminate errors.
1995 June - Telephonics supoena's the Petitioner for a deposition in their Court of Claims case. In his deposition,Telephonics discovered that the Petitioner had extensive meetings with CECOM"S Criminal Investigation personnel.
1995 Sept-Telephonics offers DOJ a Settlement of $699,000,which is the same offer made to CECOM in March 1992 when Telephonics discovered that the Petitioner was employed by CECOM; this seems to demonstrate Telephonics low confidence in their claim. This time DOJ, who had not received the the disclosure information of all the cost changes submitted by Telephonics, when accepted their offer.
1995 Dec 18- The false settlement Agreement of $699,000 for the false claim is signed by Telephonics and DOJ. This Settlement Agreement violates **the false Statements Act** 18USC 1001(failed to disclose the the content of Rodale lawsuit in which Telephonics denies that the drawings were defective), The Truth in Negotiation Act(failed to disclose the cost increases due to the terminations-$750,000 and the false claim ECPs $500,000), FALSE CLAIMS ACT 31USCsec3127 .(for multiple reasons previously discussed).Telephonics cannot deny the above because the same employee signed both the Settlement, and the Rodale civil suit.

Further, the warranty clause of the Settlement Agreement requires Telephonics to immediately reurn the settlement amount -$699,000 plus interest,if any breach of the ettlement agreement occurs, and the failure to disclose the Rodale lawsuit and the terms there of certainly constitutes a breach of the warranty.The only question is whether or not the Settlement is subject to the FALSE CLAIM ACT, or the warranty clause.
1996 Jan.28-The False Settlement Agreement is incorporated into the Contract.
1996 Feb- The final false claim is presented for payment,Payment is made on the FALSE CLAIM of 12/10/92or 9/27/91.

mid-1996- Malloy begins drafting the Qui Tam Complaint.
1996 Oct- Malloy is rushed to Emergency and into eurosurgery to repair a leaking blood Vessel in his brain, recovery from which delayed the final drafting of his omplaint five months before Malloy was recovered enough to restart the draft the of the complaint. Both Courts denied that this delay should be considered for equitable tolling.. The delay caused by Telephonics between the rejection of the 9/27/91false claim on 5/5/92, and the filing of the Court of Claims case on 12/10/92(7 months). The final area is the failure to disclose Rodale and the False ECP claims which mislead the DOJ during the Court of Claims Case(12/10/92 to 12/18/95- 36 months). These events covering 48 months had not been considered for Equitable Tolling.The Federal Court of Newark NJ without

considering the above events dismissed the complaint with prejudice for exceeding the Statute of Limitations using the (9/27/91) False Claim as their base, by 82 days.
1

SUMMARY

This contract began with violations of the False Statement Act,The Truth in Negotiations Act, and the False Claims Act;, and continued with theFalse Claim of 9/27/91 also violated these three Acts.In the Settlement Agreement Telephonics violated these laws for a third time.

Telephonics violated the ontract Clause18-Limitation of Progress Payments and submitted Dozens of false progress payment claims, accumulating **EIGHT MILLION DOLLARS** in contractually unauthorized funds.Violating C3-Configuration Control 6 times, and then cynically using it as a defense.

Telephonics did not disclose the negoiated cost ECPs processed in parallel with the Court of Claims Appeal. DOJ was not aware of nearly $1,000,000 in additional False Claims , when DOJ settled the False Claim. The arguments presented by the Petitioner, and the costs associated with those arguments were ignored, and False Claims which exceeded the 9/27/91 false claim by millions were ignored.

ON THE BASIS OF THE PRECEDING, THE APPELLANT ARGUES THAT THE CONTINOUS NATURE OF THESE FRAUDS MAKE THE DETERMINATION OF AN EQUITIBLE STATUTE OF LIMITATION DATE EXTREMELY DIFFICULT UNLESS THE PAYMENT OF THE SETTTLEMENT AGREEMENT (2/96) WHICH FINALLY ENDED THIS PARADE OF FRAUD IS CONSIDERED AS THE MOST LOGICAL POINT . BUT THE PRECEDING PAGES DEMONSTRATE THAT THIS ENTIRE CONTRACT MONTH BY MONTH WAS A FRAUD INTENTIONALLY CONDUCTED BY TELEPHONICS.

As pointed out in McNinch each Progress Payment is a False Claim, one per month from 11/89 to 8/65; and 7 per month from 7/95 to 8/95.

althrough not listed here are the 44 alleged counts of criminal acts during this fraud with the participation in the fraud by every manager or executive of Telephonics. The majority of these frauds were catalogued in the Appellant's complaint.

THE PETITIONER RESPECTFULLY REQUESTS THE COURT, BASED ON THE DATA PRESENTED ,TO GRANT THE WRIT OF CERTIORATI.

RESPECTFULLY SUBMITTED,

John F. Malloy
Petitioner (acting Pro se)

SUMATION OF THE FRAUD:

1.)TELEPHONICS WAS CONTRACTED TO PROVIDE A FULLY QUALIFIED AN/PPS-5B SYSTEM. ALL THE REQUIRED TESTS WERE FAILED, AND THE ONLY WAY THE EQUIPMENT COULD BE SHIPPED WAS ON WAIVERS.
2.)THE FALSE CLAIMS USED TO DECIEVE DOJ IN THE SETTLEMENT AGREEMENT:

FINAL CONTRACT PRICE: $13,719, 314
ORIGINAL CONTRACT PRICE : 12,492,318
INCREASE-FALSE CLAIMS $1,226,996

BY FALSE PROGRESS PAYMENTS.(**The Petitioner estimates the amount at $8,000,000 over a four year period)**

REASONS FOR GRANTING THIS PETITION

1.) The lower Courts Failure to consider the total fraud presented in the STATEMENT OF THE CASE, AND IN THE CASE LAW CITED, ONLY RECOGNIZING THE 9/27/91 FALSE CLAIM AS THE ONLY FALSE CLAIM SUBMITTED AGAINST THIS ARMY CONTRACT WAS INCORRECT.

2.) THE LOWER COURTS APPLIED EQUITABLE TOLLING IN AN APPROACH WHICH REWARDED TELEPHONICS FOR THEIR 43 MONTHS OF DELAY AND PENALIZED THE PETITIONER, FOR 33DAYS LATE.

3.) WHEN DOCKET 98-1528 WAS OPENED IN FEDERAL COURT NEWARK, THE DOCUMENT CONTAINED THE NAME, ADDRESS AND PHONE NUMBER OF TELEPHONICS ATTORNEY. WHEN THIS WAS USED BY THE PETITIONER IN HIS MOTION TO RECONSIDER THE 9/27/99 DISMISSAL WHERE HE CLAIMED THAT SERVICE OF THE COMPLAINT HAD DE FACTO BEEN ACCOMPLISHED BY THIS ERROR, AND DISMISSAL FOR VIOLATING THE 120 day RULE SHOULD BE VACATED.

4.) TITLE 31 SEC 3730 REQUIRES THE CONSENT OF THE ATTORNEY GENERAL BEFORE THE ACTION CAN BE DISMISSED. THE PETITIONER HAS NEVER BEEN PROVIDED THIS

DOCUMENT, EVEN AFTER THE LACK OF THIS DOCUMENT WAS USED IN THE MOTION TO RECONSIDER, AND IF IT EXISTS THEN THE PETITIONER DID NOT HAVE AN OPPORTUNITY TO RESPOND TO THE ATTORNEY GENERAL'S REASONS FOR CONSENTING, WHICH IF IT EXISTS MAY HAVE INFLUENCED THE FEDERAL COURT NEWARK'S OPINION.

6.) THE DELAYS THE PETITIONER ENCOUNTERED ON HIS FOIA REQUESTS. HIS REQUEST FOR THE THE CONTRACT RESULTED IN AN INCOMPLETE SET; THE LAST MODIFICATION WAS MISSING, AND A SEPARATE FOIA HAD TO BE SUBMITTED FOR IT. WHEN THE CHARGE FOR THIS MODIFICATION WAS TWICE THE COST OF THE ENTIRE CONTRACT, HE CHALLENGED. THE RESPONSE WAS THAT THIS MODIFICATION HAD NOT BEEN FILED WITH THE REST OF THE CONTRACT, AND IT TOOK TIME(2DAYS) TO FIND IT, AND ALSO REQUIRED" SOMEBODY'S" AUTHORIZATION TO RELEASE. HIS MODIFICATION CONTAINED THE DOJ SETTLEMENT AGREEMENT, WHICH IS EXACTLY WHAT HE SUSPECTED. WHEN HE COMPARED THE CLAUSES OF THIS AGREEMENT WITH THE RODALE LAWSUIT,THE EXTENT OF FRAUD BECAME APPARENT. WHEN A FOIA WAS ISSUED TO OBTAIN ACCESS TO THE CONTRACTING OFFICER'S FILES. THE WORD CAME BACK TO THE PETITIONER THROUGH A BACKCHANNEL THAT "THE SOMEBODY" HAD STATED UNDER NO CIRCUMSTANCES WAS I TO BE ALLOWED TO SEE THOSE FILES. AFTER REQUESTING MY CONGRESSMAN, I FINALLY RECEIVED A LETTER

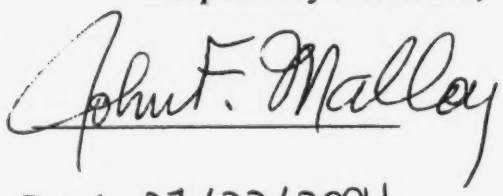
FROM A COLONEL IN THE CONGRESSIONAL LIAISON OFFICE, AND AFTER SEVERAL ROUNDS OF LETTERS AND CALLS, THE PETITIONER FINALLY HAD ACCESS TO THE FILES IN JULY 2000. THESE FILES WERE SCHEDULED TO BE DESTROYED IN TWO WEEKS; I ALWAYS THOUGHT THAT THE TIME OF DESTRUCTION WAS 5 OR 7 YEARS AFTER THE CLOSING OF THE CONTRACT(2/96) IN THIS CASE ONE OR THREE YEARS EARLIER THAN THEY SHOULD HAVE BEEN DESTROYED.

7.) THE PETITIONER HAD DELAYED THE FILING OF HIS COMPLAINT UNTIL DOJ'S SETTLEMENT OF THE COURT OF CLAIMS CASE ON 12/18/95.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Dated: 01/22/2004